

**Governor's Advisory Committee
On The Transfer Of
Chief Executive Powers**

FINAL REPORT

**Presented to
Governor Phil Bredesen**

January 14, 2008

January 14, 2008

The Honorable Phil Bredesen
State Capitol
600 Charlotte Avenue
Nashville, TN 37243

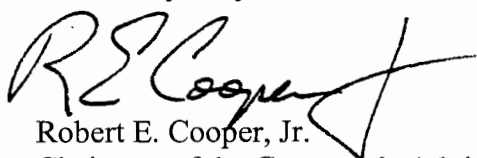
Dear Governor Bredesen:

We are pleased to present the report of the Governor's Advisory Committee on the Transfer of Chief Executive Powers.

The eight members of the Advisory Committee met four times last year. As you requested, we reviewed and discussed constitutional provisions, laws and practices related to the transfer of gubernatorial powers in Tennessee and in other states. As a result of that review, we recommend that Tennessee amend its constitution to permit the temporary transfer of executive authority in limited circumstances. We have attached to this report a draft joint resolution that would accomplish such an amendment.

The members of the Advisory Committee are grateful for the honor of serving our state in this capacity and hope that this report will assist the state in addressing the serious issue of operating state government in the event of gubernatorial incapacitation.

Yours very truly,

A handwritten signature in black ink, appearing to read "R E Cooper, Jr.", with a stylized flourish extending from the end.

Robert E. Cooper, Jr.
Chairman of the Governor's Advisory Committee
on the Transfer of Chief Executive Powers

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Creation of the Governor's Advisory Committee on the Transfer of Chief Executive Powers

On March 20, 2007, Governor Phil Bredesen signed Executive Order No. 45 creating the Governor's Advisory Committee on the Transfer of Chief Executive Powers.¹ He charged the Committee "with conducting a comprehensive review of any current Tennessee constitutional provisions, laws and practices related to the transfer of the powers of the governor" and "with reviewing the constitutional provisions, laws and practices used by other states to ensure continuity in the operation of state government in the event a governor were to be incapacitated." The Committee's written report "shall include drafts of any constitutional amendments and any related joint resolutions or bills proposed for introduction in the General Assembly."

The Executive Order designated the following persons to serve on the Committee:

- Robert E. Cooper, Jr., Attorney General and Reporter;
- Ron Ramsey, Speaker of the Senate;
- Jimmy Naifeh, Speaker of the House of Representatives;
- Adolpho A. Birch, Jr., Former Chief Justice of the Tennessee Supreme Court;
- Ned R. McWherter, Former Governor of Tennessee;
- Glenn H. Reynolds, Beauchamp Brogan Distinguished Professor of Law at the University of Tennessee College of Law;
- Steven E. Elkins, Legal Counsel to the Governor; and
- Kim McMillan, Senior Advisor to the Governor.

¹ Executive Order No. 45 is attached to this report as Exhibit 1.

Summary of the Proceedings of the Committee

The first meeting of the Committee was held on April, 26, 2007. All members except Governor McWherter were present. The Committee heard from Governor Bredesen. Following the Governor, Attorney General and Reporter Robert E. Cooper, Jr., made brief remarks. Then the Committee heard a presentation from Jon Laramore, former Legal Counsel to the Governor of Indiana. Mr. Laramore provided information regarding the transfer of powers when Governor O'Bannon had a stroke in 2003 and went into a coma for several days before dying. The Committee also heard a presentation by Chief Deputy Attorney General Andy D. Bennett regarding the history of Tennessee's relevant constitutional provisions and the manner in which other states address gubernatorial disability.² After some discussion, the Committee directed General Bennett to provide the committee with a list of options for each of the questions he suggested the Committee needed to address.

At the June 14, 2007 meeting, at which all members were present, the Committee discussed the options memo prepared for the meeting.³ The Committee reached conclusions as to the options and directed General Bennett to prepare a draft amendment.

Discussion of a draft amendment was held at the July 18, 2007 meeting, at which all members were present except former Chief Justice Birch.⁴ The Committee revised portions of the draft and requested General Bennett to prepare a Report to the Governor. The Committee met for

²The presentations from General Bennett and Mr. Laramore are attached to this report as Exhibit 2.

³The options memo is attached to this report as Exhibit 3.

⁴The draft amendment is attached to this report as Exhibit 4.

a final time on September 13, 2007, and decided to add the "Other Considerations" section to the Report.

Historical and Legal Background

The Tennessee Constitution of 1796 contained the following language in Article II, Sec. XII: “In case of his [the governor’s] death, or resignation, or removal from office, the speaker of the senate shall exercise the office of governor until another governor shall be duly qualified.” This provision was used only once under the 1796 Constitution, in April 1829 when Governor Sam Houston resigned after his wife Eliza left him. Speaker of the Senate William Hall became governor and served out the term.

Article IV, Sec. XII of the Tennessee Constitution of 1835 provided: “In case of the removal of the Governor from office, or of his death, or resignation, the powers and duties of the office shall devolve on the Speaker of the Senate; and in case of the death, removal from office, or resignation of the Speaker of the Senate, the powers and duties of the office shall devolve on the Speaker of the House of Representatives.” Thus, the only change in the provision from the 1796 version was to add the Speaker of the House of Representatives to the line of succession.

This provision was used only once under the 1835 Constitution, but it led to important discussions. Governor William “Parson” Brownlow resigned in February 1869 to become a U.S. Senator. He was replaced by Senator Dewitt Clinton Senter, the Speaker of the Senate. When Governor Brownlow announced his resignation, the Senate asked the Judiciary Committee to report whether the acceptance of the office of governor by the Speaker of the Senate vacated the

Speakership and vacated the seat held by the Speaker. The Judiciary Committee concluded⁵ that whenever the powers and duties of the office of Governor devolve upon the Speaker of the Senate, the Speakership of the Senate will become vacant and the Speaker will cease to be a member of the Senate. The Senate promptly passed Senate Resolution 25 which adopted these conclusions.

Article III, Section 12 of Tennessee Constitution of 1870 is the same as in the Constitution of 1835. This provision has been used twice since 1870. In 1905 Governor James Frazier resigned to become a U.S. Senator. He was replaced by Speaker of the Senate John I. Cox.

After John Cox took the oath of office, the Senate passed a resolution asking the Attorney General to provide an opinion as to “whether the office of Speaker of the Senate became vacant when, upon the resignation of the office of Governor by the Honorable James B. Frazier, the Honorable John I. Cox, Speaker of the Senate, took the oath of office and assumed the powers and duties of the office of Governor under the Constitution.”⁶

Attorney General Charles T. Cates, Jr. supplied an opinion⁷ which held as follows:

1. That there is no warrant or authority to be found in the Constitution of this State for an “Acting Governor.”
2. That upon the resignation of the office of Governor by the Honorable James B. Frazier, the powers and duties of that office devolved upon the Hon. John I. Cox, to be exercised by him, not in virtue of his office as Speaker of the Senate, but, upon acceptance and qualification as Governor of the State, vested with the powers and duties of the office of Governor for the remainder of the unexpired term and until a successor shall be both elected and qualified in the manner provided by the Constitution.

⁵The Senate Judiciary Committee Report may be found in the 1869 Senate Journal, at 268-72.

⁶Senate Resolution No. 31 (Mar. 27, 1905)

⁷The opinion is printed in 1905 Senate Journal at 367-83. It is summarized in 8 *Messages of the Governors of Tennessee* (White ed., 1972) at 346-48.

3. That the offices of the Governor and Speaker of the Senate are incompatible, and that it was not within the intention of the makers of the Constitution that these offices, or their powers and duties, should be exercised by the same person.

4. That the acceptance by the Speaker of the Senate of the office of Governor, and his qualification as such, rendered the office of Speaker of the Senate vacant, and not only authorized the Senate, without more, to elect a new Speaker, but in order that the Senate may exercise its constitutional functions and validity be given to its acts, it is necessary that a Speaker be elected to the office thus made vacant.”

The second time the provision was used under the 1870 Tennessee Constitution was in 1927.

Governor Austin Peay died in office. He was the first and only Tennessee governor to do so. He was replaced by Speaker of the Senate Henry Horton.

In 1941, Tenn. Code Ann. § 8-1-107 was enacted to provide for gubernatorial succession in case the offices of Speaker of the Senate and Speaker of the House of Representatives were both vacant: “Whenever a vacancy exists in the office of governor from death, resignation or other cause, creating a vacancy therein, and there is no speaker of the senate nor speaker of the house at such time, then and in that event the secretary of state shall become governor, and in case of the death or resignation of the secretary of state, then the comptroller of the treasury shall become governor.”

Pursuant to Tenn. Code Ann. § 8-2-102 the Speaker of the Senate is also the Lieutenant Governor. This law was enacted in 1951.

A provision for inability to sign documents was enacted in 1979 and is codified as Tenn. Code Ann. § 8-1-109, which states:

(a) The governor shall personally affix the governor's signature to bills, joint resolutions, executive orders or veto messages, and to reprieves, pardons and commutations.

(b) (1) In the event the governor is physically incapacitated due to health or is out of the state on official business and is unable to sign those items enumerated in subsection (a), the governor may authorize a power of attorney to an individual for a specified period of time for the purpose of affixing the governor's signature to such items.

(2) If the governor is physically incapacitated due to health and unable to sign such items, the power of attorney shall be accompanied by a physician's affidavit that the governor is

physically incapacitated due to health and is unable to personally sign such items.

(3) The power of attorney shall only be for the affixing of the governor's signature and not for the decision of approval or nonapproval of such items. It is the express intent of this section that the governor may delegate only the affixing of the governor's signature and not the decision of approval or nonapproval of such items.

The most recent commentary on gubernatorial disability by the Attorney General's Office is found in a letter dated September 14, 1983, to State Representative John Bragg. In that letter, Attorney General William M. Leech, Jr., indicated that "It is my opinion that any provision for the exercise of the governor's powers and duties by any other person when he is physically or mentally 'disabled' would have to be accomplished by constitutional amendment." General Leech construed Tenn. Code Ann. § 8-1-109(b) as follows: "The subsection expressly restricts this delegation of power to the affixing of the governor's signature. Gubernatorial decisionmaking power cannot be delegated. This statute therefore does not fall afoul of Article III, § 12 because it deals with a purely ministerial function." In other words, even under this statute the governor retained the decision of whether his signature should be affixed to the document. Thus, no provision of the Tennessee Constitution addresses a temporary disability of the governor.

Other States' Provisions

A review of other states' provisions reveals that the temporary transfer of gubernatorial powers is accomplished in two general ways. Almost half the states have a process by which the governor can voluntarily transfer the powers and duties of the office on a temporary basis. Almost all the states have a process for the involuntary transfer of the powers and duties of the office. They vary widely as to who can initiate the involuntary process and who makes the decision.

The Proposed Amendment

The Committee recommends to the Governor and to the General Assembly the following amendment to Article III, Section 12 of the Tennessee Constitution:

The Tennessee Constitution, Article III, Section 12 is hereby amended by designating the current language as subsection (a) and by adding the following language as subsection (b):

(b) Whenever the Governor transmits to the Secretary of State, the Speaker of the Senate and the Speaker of the House a written declaration that the Governor is unable to perform the powers and duties of the office, the powers and duties of the office of Governor shall be exercised by the Speaker of the Senate or, if that office is unoccupied, by the Speaker of the House of Representatives. The powers and duties of the office shall return to the Governor when the Governor transmits to the same officials a written declaration that the Governor is able to perform the powers and duties of the office.

Whenever the Attorney General and Reporter, after consultation with the Secretary of State, Comptroller of the Treasury and Treasurer, is of the opinion that the Governor is unable to perform the powers and duties of the office, the Attorney General shall file a petition with the Tennessee Supreme Court seeking a declaration that the Governor is unable to perform the powers and duties of the office. The Supreme Court shall have original jurisdiction to hear the petition and upon a decision by the Court that the Governor is unable to perform the powers and duties of the office, those powers and duties shall be exercised by the Speaker of the Senate or, if that office is unoccupied, by the Speaker of the House of Representatives. The Governor may at any time petition the Supreme Court to determine that the inability to perform the powers and duties of the office of Governor no longer exists. Upon such a determination by the Supreme Court, the powers and duties of the office will return to the Governor.

No person shall exercise the powers and duties of the Governor while occupying another office. If both the offices of Speaker of the Senate and Speaker of the House of Representatives are unoccupied at the time the disability is declared or determined or if both decline to assume the powers and duties of the office of Governor, then the powers and duties of the Governor shall be exercised by the Secretary of State, Comptroller of the Treasury and Treasurer, in that order. During the pendency of a disability, the Governor shall retain the salary and benefits attached to the office and the person performing the powers and duties of the office shall receive the same salary and benefits as the Governor.

A draft Senate Joint Resolution to amend the state constitution with this language is attached as Exhibit 5 to this report.

The Committee determined that it would be best to add the temporary disability provisions to Article III, Section 12 as a new subsection rather than rewrite the entire section. This comports with Governor Bredesen's request not to alter current constitutional structure or procedure, but to just add what was needed to address the problem. It also satisfies Governor McWherter's wise admonition to "keep it simple."

The first paragraph of the new subsection (b) addresses the voluntary relinquishing of the powers and duties of the governor. The federal constitution and almost half the states have such provisions. It provides a simple process by which the governor may surrender his or her authority by written declaration for a period of time. This may be done, for instance, due to the need for an extended course of medical treatment which could affect the governor's ability to focus on the job. Reacquisition of authority is accomplished by another written declaration. The Committee chose to say the powers and duties of the governor would be "exercised" by another rather than saying they "devolved" on another because the transfer of authority is temporary.

The second paragraph creates an involuntary process, that is, a process for taking away the governor's powers and duties without his or her consent. Obviously, this is a very serious undertaking and it created significant discussion among the Committee members. No committee member doubted the appropriateness of having a provision to ensure that the duties of the governor would be performed if the governor was too ill, physically or mentally, to perform them, but refused to relinquish power voluntarily. The discussion centered not on whether to allow such a transfer, but rather on who should participate and how. The Committee settled on the Attorney General and

Reporter initiating the process for two reasons. First, that officer is chosen in a non-partisan manner. Second, the Attorney General is the lawyer for the government; in other contexts, if a legal action on behalf of the state is required, he initiates it. Under the second paragraph, the Attorney General is required to consult with the Secretary of State, the Comptroller of the Treasury and the Treasurer before initiating an action to deprive the governor of the powers and duties of the office. These three officers were chosen because they derive their authority from election by legislators, who are themselves elected by the people. Note that the requirement is one of consultation, not approval. The Attorney General may act (or not act) against the advice of these three officers. Furthermore, nothing in this provision prevents the Attorney General from consulting with others, both in and out of government. No one, however, can veto the Attorney General's decision to bring such an action or his decision not to bring such an action.

To initiate the involuntary process, the Attorney General files a petition with the Tennessee Supreme Court seeking a declaration that the Governor is unable to perform the powers and duties of the office. The provision grants the Supreme Court original jurisdiction to hear the petition. This language is included because Article VI, Section 2 of the Tennessee Constitution says the jurisdiction of the Supreme Court "shall be appellate only." Without the express grant of original jurisdiction, questions could be raised about the Court's authority to hear evidence concerning the governor's ability to exercise the powers and duties of the office or otherwise conduct a thorough and appropriate hearing of the matter. The Commission agreed that the Supreme Court should decide whether the governor could exercise the powers and duties of the office because such a momentous decision requires nothing less than the express approval of the highest level of the judiciary. Subsequent to a decision that the Governor is unable to perform the powers and duties of his office,

the Governor may at any time petition the Supreme Court to determine that the inability to perform the powers and duties of the office of Governor no longer exists. If the Supreme Court agrees, the powers and duties of the office will return to the Governor.

The third paragraph contains several provisions deemed by the Committee necessary to implement the amendment. The first sentence is “No person shall exercise the powers and duties of the Governor while occupying another office.” The Senate view expressed in 1869 and the Opinion of Attorney General Cates in 1905 indicate that when a speaker of the Senate takes over the office of Governor due to the resignation of the Governor, the speaker is no longer either speaker or a senator. This is consistent with the doctrine of separation of powers and the requirement of Article III, Section 13 that no person holding any office under this State shall execute the office of Governor. The first sentence of the third paragraph ensures that the separation of powers applies during a temporary transfer of powers as well.

In light of the requirement of the first sentence, the second sentence permits the speakers of the Senate and House of Representatives to decline to accept the temporary transfer of gubernatorial powers to them. The Committee felt that it was unfair to require either speaker to give up the speakership to exercise the governor’s powers and duties for a brief period of time. Yet, the Committee also recognized that at some point someone has to take the job, even if it is for a few days. So the line of succession for this purpose was extended to the Secretary of State, the Comptroller of the Treasury and the Treasurer, in that order, and these officers were not given permission to decline the temporary exercise of the governor’s powers.

The third sentence addresses compensation. It allows the Governor to retain the salary and benefits attached to the office during the pendency of the disability. This removes a major incentive

for the Governor to attempt to retain power in spite of the inability to perform the powers and duties of the office. The provision also allows the person performing the powers and duties of the office to receive the same salary and benefits as the Governor. While the Committee believes that a person who performs the duties should be compensated at the statutory levels for that job, it notes that this provision could allow someone who performs the duties only briefly to receive an enlarged pension.

Other Considerations

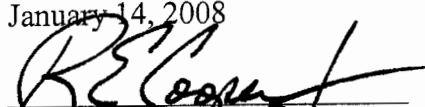
The Committee notes that there have been recent discussions and proposals for the creation of an elected Lieutenant Governor as a constitutional officer of the state. If the state's constitution were amended to create the office of Lieutenant Governor, then that office would presumably become first in the line of succession to the Governor, both in the event of death, resignation or removal or in the event of temporary incapacitation. The proposal contained in this report could be modified easily to accommodate this new office.

- The current language of Article II, Section 12, designated as subsection (a) by the proposed amendment, would need to be amended to add the Lieutenant Governor as the first in the line of succession.
- The first paragraph of proposed subsection (b) would need to be amended to add the Lieutenant Governor as the first in the line of succession and as a recipient of the Governor's written declaration.
- The second paragraph of proposed subsection (b) would need to be amended to add the Lieutenant Governor as the first in the line of succession.
- The third paragraph of proposed subsection (b) should be amended as well. With the addition of the Lieutenant Governor to the line of succession, probably only the last sentence would need to be retained.

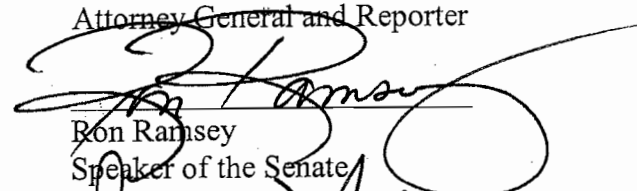
Conclusion

The foregoing constitutes the full and complete report of the Governor's Advisory Committee on the Transfer of Chief Executive Powers. The Committee hopes that the Governor, the General Assembly and the public will find its work useful in addressing this important issue. Finally the Committee wishes to express its appreciation to the many people who contributed to its work.

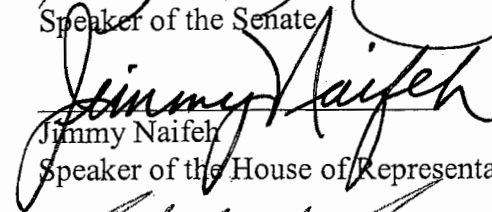
January 14, 2008



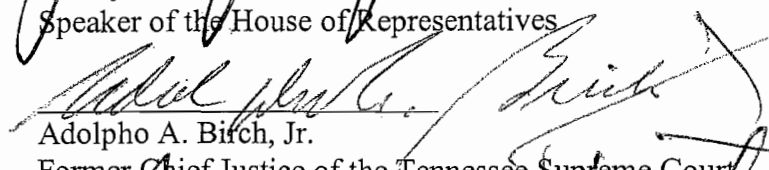
Robert E. Cooper, Jr., Chair
Attorney General and Reporter



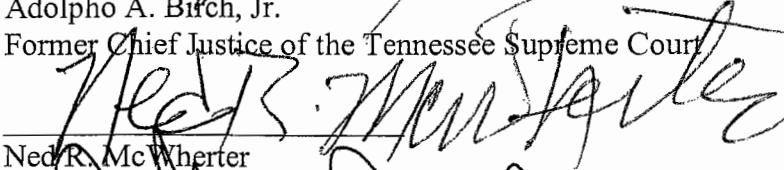
Ron Ramsey
Speaker of the Senate



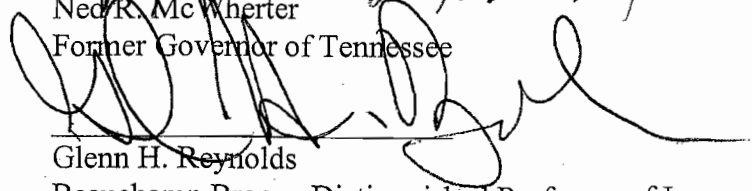
Jimmy Naifeh
Speaker of the House of Representatives



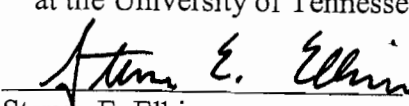
Adolpho A. Birch, Jr.
Former Chief Justice of the Tennessee Supreme Court



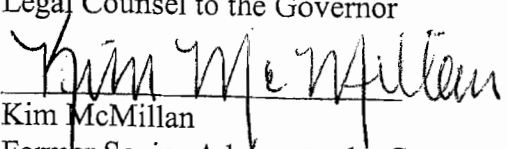
Ned R. McWhorter
Former Governor of Tennessee



Glenn H. Reynolds
Beauchamp Brogan Distinguished Professor of Law
at the University of Tennessee College of Law



Steven E. Elkins
Legal Counsel to the Governor



Kim McMillan
Former Senior Advisor to the Governor

Exhibit 1



STATE OF TENNESSEE
EXECUTIVE ORDER
BY THE GOVERNOR

Number 45

**AN ORDER ESTABLISHING THE GOVERNOR'S ADVISORY COMMITTEE
ON THE TRANSFER OF CHIEF EXECUTIVE POWERS**

WHEREAS, the Tennessee Constitution and law do not provide for the transfer of the governor's chief executive powers to another individual during such time periods when the governor is incapacitated and therefore unable to exercise the powers or discharge the duties of the office; and

WHEREAS, other states have developed constitutional provisions and laws providing for various methods of transferring the powers and duties of the governor to another individual in the event the governor is incapacitated; and

WHEREAS, this Administration is committed to addressing this issue in order to ensure continuity in the operation of state government in the event of gubernatorial incapacity; and

WHEREAS, this Administration seeks to review comprehensively the constitutional provisions, laws and practices of Tennessee and other states in this area and to determine any needed actions.

NOW THEREFORE, I, Phil Bredesen, Governor of the State of Tennessee, by virtue of the power and authority vested in me by the Tennessee Constitution and law, do hereby order and direct the following:

1. The Governor's Advisory Committee on the Transfer of Chief Executive Powers ("Committee") is hereby established. The Committee is charged with conducting a comprehensive review of any current Tennessee constitutional provisions, laws and practices related to the transfer of the powers of the governor. The committee is also charged with reviewing the constitutional provisions, laws and practices used by other states to ensure continuity in the operation of state government in the event a governor were to be incapacitated. Following this review, and on or before October 1, 2007, the Committee shall provide a written report to the governor detailing its findings. This report shall include drafts of any constitutional amendments and any related joint resolutions or bills proposed for introduction in the General Assembly.
2. The Committee shall have eight (8) members consisting of the following individuals:
 - a. Robert E. Cooper, Jr., Attorney General and Reporter;
 - b. Ron Ramsey, Speaker of the Senate;
 - c. Jimmy Naifeh, Speaker of the House of Representatives;
 - d. Adolpho A. Birch, Jr., Former Chief Justice of the Tennessee Supreme Court;
 - e. Ned R. McWhorter, Former Governor of Tennessee;
 - f. Glenn H. Reynolds, Professor of law at the University of Tennessee College of Law;

- g. Steven E. Elkins, Legal Counsel to the Governor; and
- h. Kim McMillan, Senior Advisor to the Governor

3. The Committee shall be attached to the Office of the Governor for administrative purposes.
4. The attorney general and reporter shall serve as chairperson of the Committee.
5. The Committee shall convene for its initial meeting on or before April 16, 2007, at a place and time to be determined by the chairperson. Thereafter, the Committee shall meet at such times and places as determined by the chairperson.
6. Non-legislative members of the Committee shall receive no compensation for their service on the Committee but may be reimbursed for those expenses allowed by the provisions of the comprehensive travel regulations as promulgated by the Department of Finance and Administration and approved by the attorney general and reporter. Members of the General Assembly shall be reimbursed in the same manner as they are paid for attending legislative meetings pursuant to Tennessee Code Annotated, Section 3-1-106.
7. All Executive branch departments, agencies, boards and commissions, and any other divisions of state government shall fully cooperate with the Committee in carrying out the mandates of this Executive Order and shall provide staff support and any other assistance as requested.
8. The Committee shall cease to function following the presentation of its report.

IN WITNESS WHEREOF, I have subscribed my signature and caused the Great Seal of the State of Tennessee to be affixed this 20th day of March, 2007.


GOVERNOR

ATTEST:


SECRETARY OF STATE



Exhibit 2

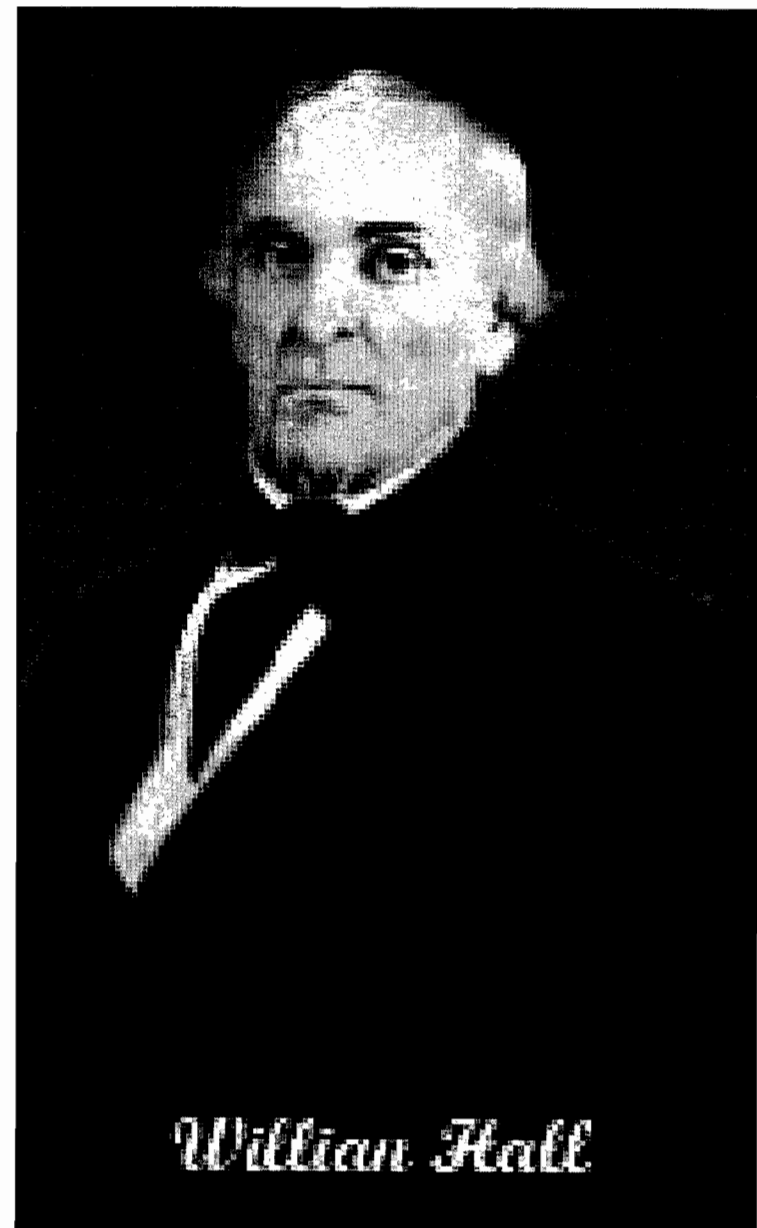
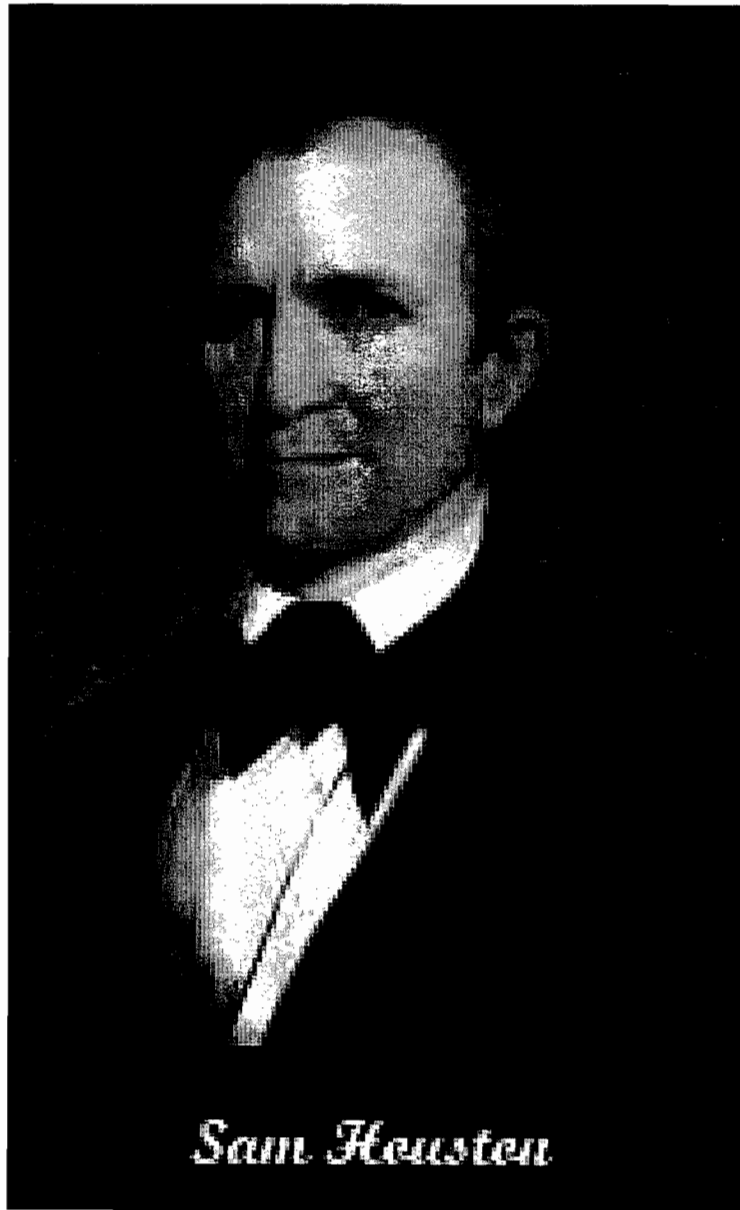
Governor's Advisory Committee on
the Temporary Transfer of Chief
Executive Powers

April 26, 2007

Tennessee Constitution of 1796

Article II, Sec. XII: “In case of his [the governor’s] death, or resignation, or removal from office, the speaker of the senate shall exercise the office of governor until another governor shall be duly qualified.”

This provision is probably based on the Pennsylvania Constitution of 1790, Art. II, Sec. 14.



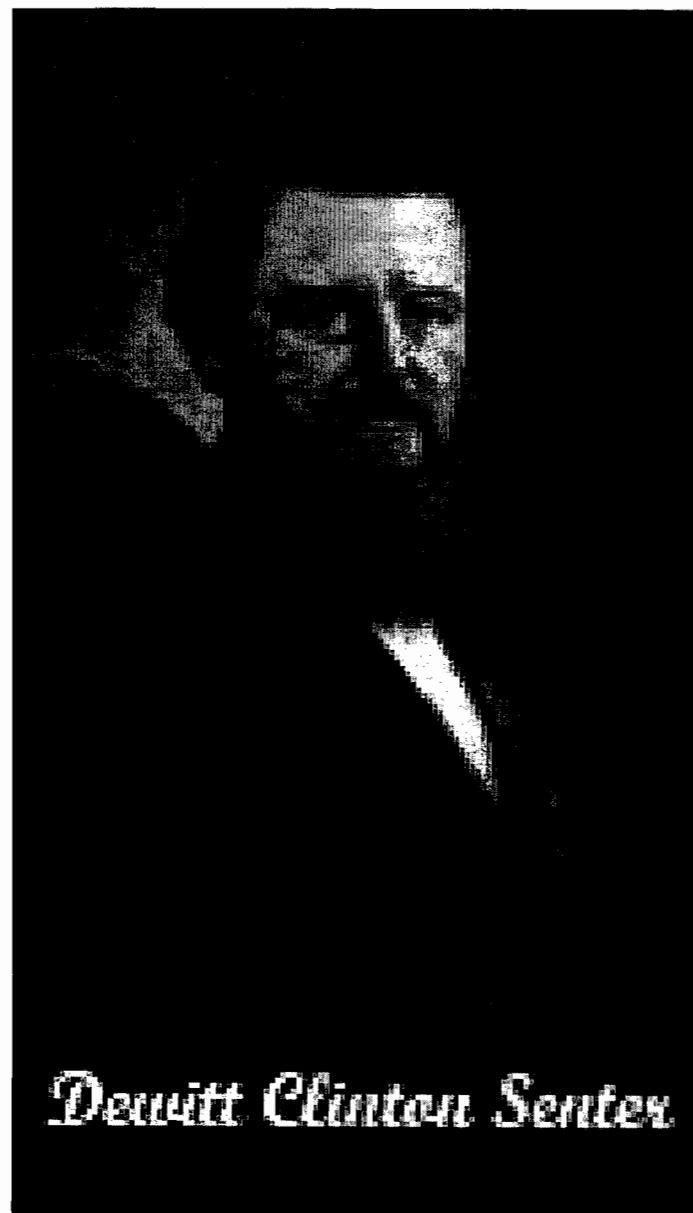
Tennessee Constitution of 1835

Article IV, Sec. XII: In case of the removal of the Governor from office, or of his death, or resignation, the powers and duties of the office shall devolve on the Speaker of the Senate; and in case of the death, removal from office, or resignation of the Speaker of the Senate, the powers and duties of the office shall devolve on the Speaker of the House of Representatives.

The only change in the provision from the 1796 version was to add the Speaker of the House to the line of succession.



William Brownlow



Dewitt Clinton Senter

When Governor Brownlow announced his resignation, the Senate asked the Judiciary Committee to report whether the acceptance of the office of governor by the Speaker of the Senate vacated the Speakership and vacated the seat held by the Speaker.

The Judiciary Committee concluded that whenever the powers and duties of the office of Governor devolve upon the Speaker of the Senate

1. the Speakership of the Senate will become vacant
2. the Speaker will cease to be a member of the Senate

The Senate promptly passed Senate Resolution 25 which adopted these conclusions.

Tennessee Constitution of 1870 [same as 1835]

Article III, Sec. 12: In case of the removal of the Governor from office, or of his death, or resignation, the powers and duties of the office shall devolve on the Speaker of the Senate; and in case of the death, removal from office, or resignation of the Speaker of the Senate, the powers and duties of the office shall devolve on the Speaker of the House of Representatives.



After John Cox took the oath of office, the Senate passed a resolution asking the Attorney General to provide an opinion as to

“whether the office of Speaker of the Senate became vacant when, upon the resignation of the office of Governor by the Honorable James B. Frazier, the Honorable John I. Cox, Speaker of the Senate, took the oath of office and assumed the powers and duties of the office of Governor under the Constitution.”

Attorney General Charles T. Cates, Jr. supplied an opinion which held as follows:

“1. That there is no warrant or authority to be found in the Constitution of this State for an “Acting Governor.”

2. That upon the resignation of the office of Governor by the Honorable James B. Frazier, the powers and duties of that office devolved upon the Hon. John I. Cox, to be exercised by him, not in virtue of his office as Speaker of the Senate, but, upon acceptance and qualification as Governor of the State, vested with the powers and duties of the office of Governor for the remainder of the unexpired term....

3. That the offices of the Governor and Speaker of the Senate are incompatible, and that it was not within the intention of the makers of the Constitution that these offices, or their powers and duties, should be exercised by the same person.

4. That the acceptance by the Speaker of the Senate of the office of Governor, and his qualification as such, rendered the office of Speaker of the Senate vacant, and not only authorized the Senate, without more, to elect a new Speaker, but in order that the Senate may exercise its constitutional functions and validity be given to its acts, it is necessary that a Speaker be elected to the office thus made vacant.”



Austin Peay



Henry Horton

In 1941, Tenn. Code Ann. § 8-1-107 was enacted to provide for gubernatorial succession in case the offices of Speaker of the Senate and Speaker of the House of Representatives were both vacant:

“Whenever a vacancy exists in the office of governor from death, resignation or other cause, creating a vacancy therein, and there is no speaker of the senate nor speaker of the house at such time, then and in that event the secretary of state shall become governor, and in case of the death or resignation of the secretary of state, then the comptroller of the treasury shall become governor.”

Pursuant to Tenn. Code Ann. § 8-2-102 the Speaker of the Senate is also the Lieutenant Governor. This law was enacted in 1951.

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(a) The governor shall personally affix the governor's signature to bills, joint resolutions, executive orders or veto messages, and to reprieves, pardons and commutations.

(b)(1) In the event the governor is physically incapacitated due to health or is out of the state on official business and is unable to sign those items enumerated in subsection (a), the governor may authorize a power of attorney to an individual for a specified period of time for the purpose of affixing the governor's signature to such items.

(2) If the governor is physically incapacitated due to health and unable to sign such items, the power of attorney shall be accompanied by a physician's affidavit that the governor is physically incapacitated due to health and is unable to personally sign such items.

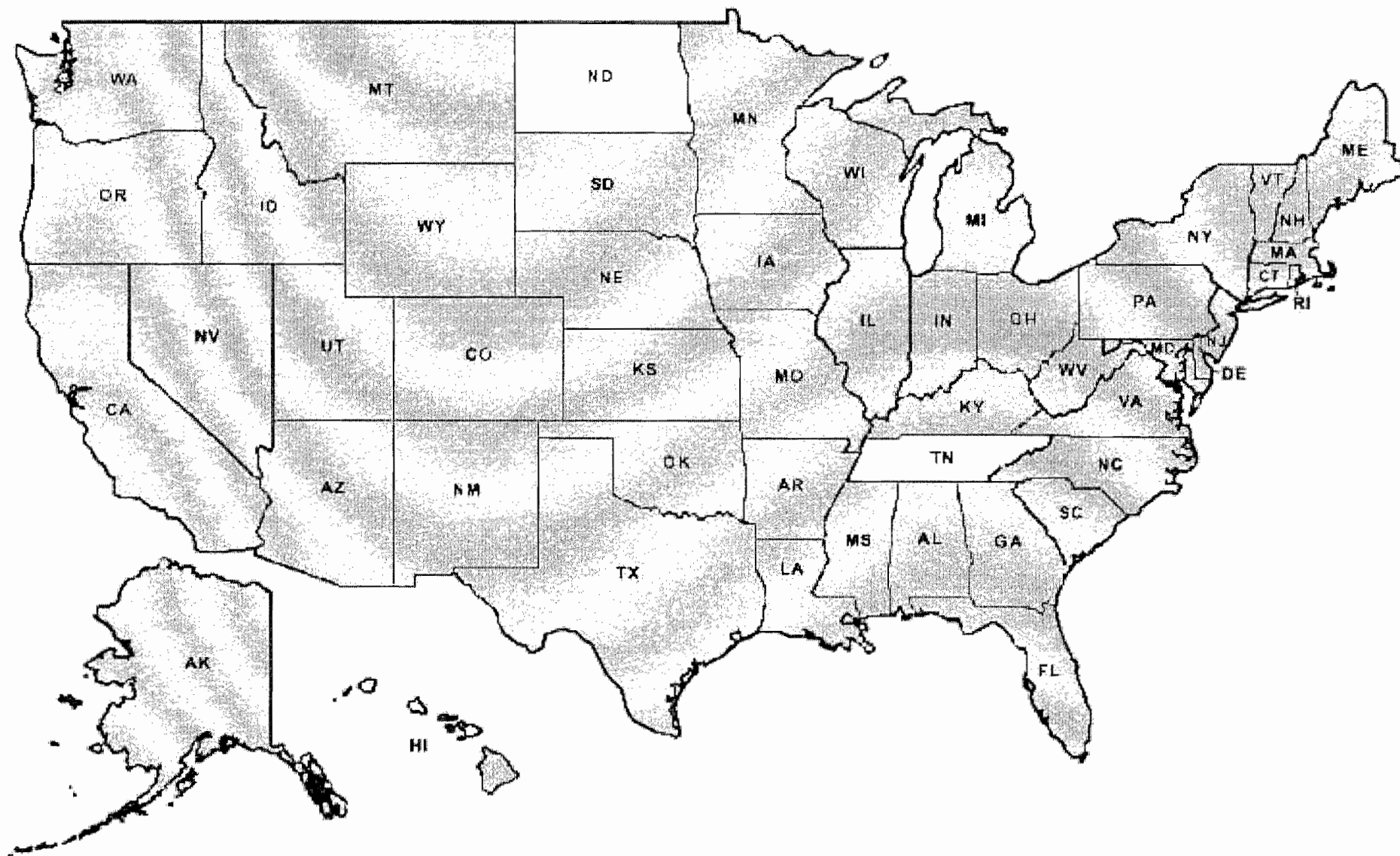
(3) The power of attorney shall only be for the affixing of the governor's signature and not for the decision of approval or nonapproval of such items. It is the express intent of this section that the governor may delegate only the affixing of the governor's signature and not the decision of approval or nonapproval of such items.

The most recent commentary on gubernatorial disability by the Attorney General's Office is found in a letter dated September 14, 1983 to State Representative John Bragg.

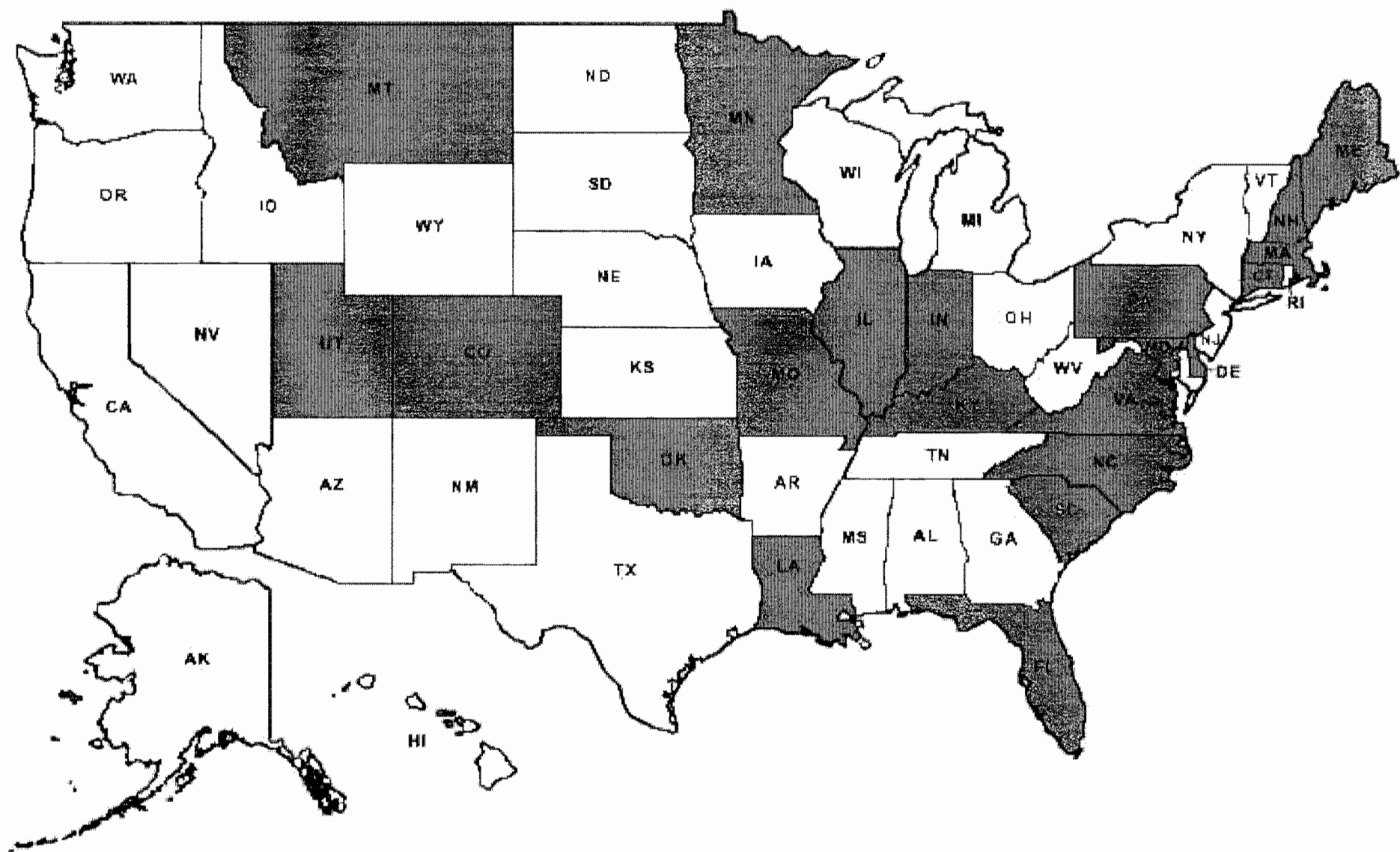
In that letter, Attorney General William M. Leech, Jr. indicated that "It is my opinion that any provision for the exercise of the governor's powers and duties by any other person when he is physically or mentally 'disabled' would have to be accomplished by constitutional amendment."

General Leech considered Tenn. Code Ann. § 8-1-109(b): "The subsection expressly restricts this delegation of power to the affixing of the governor's signature. Gubernatorial decisionmaking power cannot be delegated. This statute therefore does not fall afoul of Article III, § 12 because it deals with a purely ministerial function." In other words, even under this statute the governor retained the decision of whether his signature should be affixed to the document.

How other states handle the issue of Gubernatorial Disability



Many state constitutions provide that the governor may voluntarily declare himself or herself unable to perform the duties of the office.



In most cases, the governor gives written notice to a designated official.

Often, the notice goes to the head of each House of the legislature

Colorado, Delaware, Indiana, Louisiana,
Massachusetts, Missouri, New Hampshire, South
Carolina, Virginia

* Minnesota, Oklahoma and Pennsylvania have constitutional provisions that envision the governor being unable to perform the duties of the office, but provide for the mechanism of a voluntarily declaration of disability by statute

Some states designate other officials to receive the declaration

Connecticut, Maryland, Montana—Lt. Governor

Florida--Custodian of State Records

Illinois--Secretary of State and person next in line of
succession

Kentucky--certify by entry in Governor's Journal

Maine--Chief Justice

North Carolina--Attorney General

Utah--Supreme Court

The Governor is usually allowed to resume the duties of the office upon written notice to the same officials. Some states provide for a period of a few days to allow another body such as the legislature or the state Supreme Court to meet and determine that the Governor is still incapacitated.

Constitutions differ greatly in how a Governor may be declared incapacitated and removed from active duty without his or her consent.

Initiating the process

(i) by a designated body or group

Florida (three cabinet members)

Delaware (Chief Justice, President of the Delaware Medical Society and Commissioner of Mental Health, acting unanimously)

Massachusetts (majority of Supreme Court)

New Hampshire (Attorney General and majority of the executive council)

(ii) by the speakers of the two legislative houses

Indiana, Michigan, Utah

(iii) by a two-thirds vote of all members of each House

Colorado, Ohio

(iv) by a single official

Kentucky (Attorney General petitions Supreme Court)

Maine & Mississippi (Secretary of State)

Maryland (Lt. Governor calls legislature into session)

Making the Decision.

- (i). Most states that have a process for declaring the governor incapacitated make the state Supreme Court the final decision maker

Colorado, Indiana, Kentucky, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, New Hampshire, Ohio, Oklahoma, South Dakota, Utah

- (ii) Some states provide for a body or group to decide

Iowa, Nebraska, Oregon, Wisconsin (all by statute)

(iii) In some states a final decision is made by a vote of both houses of the state legislature, frequently by a two-thirds vote

Connecticut, Delaware, Massachusetts, Montana, North Carolina, Pennsylvania (statute), South Carolina, Virginia.

Once the determination is made, it is reversed in approximately the same manner.

SUMMARY

Questions this committee will have to address in developing a proposal include:

What form does this amendment take?

Add a new paragraph to Art. III, Sec. 12?

Rewrite Art. III, Sec. 12?

Do you want to include a voluntary process?

To whom shall the governor deliver the notice?

How does the governor resume power?

Do you want a process by which the governor's resumption of power can be challenged?

Who initiates an involuntary process for declaring the governor disabled?

Who are the decision-makers?

What process do you want for making the decision?

What process do you want for undoing that decision once the governor is no longer disabled?

Does the speaker get to return to his position after the governor resumes power?

The End

Gubernatorial Disability in Indiana: A Case Study

Jon Laramore
Baker & Daniels LLP
Indianapolis
April 26, 2007

Chronology

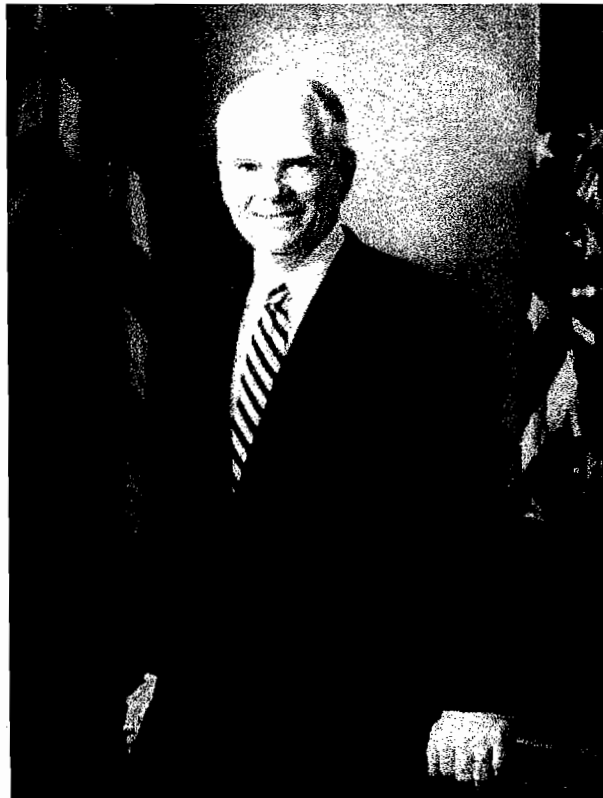
Sept. 8, 2003: Governor Frank O'Bannon disabled by stroke

Sept. 8, 2003: Lt. Governor Joe Kernan assumes duties of Acting Governor



Chronology

- Sept. 10, 2003: Legislative leaders invoke formal provisions of Art. V, § 10 to seek declaration that Lt. Governor Kernan is Acting Governor
- Sept. 10, 2003: Indiana Supreme Court declares Lt. Governor Kernan to be Acting Governor
- Sept. 13, 2003: Governor O'Bannon dies; Acting Governor Kernan sworn in as Governor



Chronology

Oct. 9, 2003: Governor Kernan nominates Katherine L. Davis as Lieutenant Governor

Oct. 20, 2003: Katherine L. Davis confirmed as Lt. Governor by General Assembly by unanimous vote



Indiana Constitution, Art. V, § 10

Section 10. (a) In case the Governor-elect fails to assume office, or in case of the death or resignation of the Governor or the Governor's removal from office, the Lieutenant Governor shall become Governor and hold office for the unexpired term of the person whom the Lieutenant Governor succeeds. In case the Governor is unable to discharge the powers and duties of the office, the Lieutenant Governor shall discharge the powers and duties of the office as Acting Governor.

(b) Whenever there is a vacancy in the office of Lieutenant Governor, the Governor shall nominate a Lieutenant Governor who shall take office upon confirmation by a majority vote in each house of the General Assembly and hold office for the unexpired term of the previous Lieutenant Governor. If the General Assembly is not in session, the Governor shall call it into special session to receive and act upon the Governor's nomination. In the event of the inability of the Lieutenant Governor to discharge the powers and duties of the office, the General Assembly may provide by law for the manner in which a person shall be selected to act in the Lieutenant Governor's place and declare which powers and duties of the office such person shall discharge.

(c) Whenever the Governor transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives the Governor's written declaration that the Governor is unable to discharge the powers and duties of the office, and until the Governor transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Lieutenant Governor as Acting Governor. Thereafter, when the Governor transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives the Governor's written declaration that no inability exists, the Governor shall resume the powers and duties of the office.

(d) Whenever the President pro tempore of the Senate and the Speaker of the House of Representatives file with the Supreme Court a written statement suggesting that the Governor is unable to discharge the powers and duties of the office, the Supreme Court shall meet within forty-eight hours to decide the question and such decision shall be final. Thereafter, whenever the Governor files with the Supreme Court the Governor's written declaration that no inability exists, the Supreme Court shall meet within forty-eight hours to decide whether such be the case and such decision shall be final. Upon a decision that no inability exists, the Governor shall resume the powers and duties of the office.

(e) Whenever there is a vacancy in both the office of Governor and Lieutenant Governor, the General Assembly shall convene in joint session forty-eight hours after such occurrence and elect a Governor from and of the same political party as the immediately past Governor by a majority vote of each house. If either house of the General Assembly is unable to assemble a quorum of its members because of vacancies in the membership of that house, the General Assembly shall convene not later than

forty-eight hours after a sufficient number of the vacancies are filled to provide a quorum of members for that house.

(f) An individual holding one (1) of the following offices shall discharge the powers and duties of the governor if the office of governor and the office of lieutenant governor are both vacant, in the order listed:

(1) The speaker of the house of representatives.

(2) The president pro tempore of the senate, if the office described in subdivision (1) is vacant.

(3) The treasurer of state, if the offices described in subdivisions (1) and (2) are vacant.

(4) The auditor of state, if the offices described in subdivisions (1) through (3) are vacant.

(5) The secretary of state, if the offices described in subdivisions (1) through (4) are vacant.

(6) The state superintendent of public instruction, if the offices described in subdivisions (1) through (5) are vacant.

(g) An individual's authority to discharge the governor's powers and duties under subsection (f) ends when the general assembly fills the office of governor under this section.

(History: As Amended November 7, 1978; November 2, 2004).

What can Tennessee learn from Indiana's experience?

Why did our transition work well?

- the rules were pretty clear
- everyone cooperated
- there were no political agendas

What problems cropped up?

- conflict in Constitution as to need for formal process to install Acting Governor
- Lt. Governor's hesitance to invoke formal process

Other Lessons, Issues and Questions

There must be clear rules governing authority when the Governor is disabled.

Should the succession process involve other branches?

- other branches protect against usurpation
- other branches may take action when the executive hesitates
- other branches can frustrate action, especially when there is a political agenda

The process needs a clear, speedy and reliable method of determining disability.

Be cognizant of the relationship of the person who serves during the Governor's disability to the Governor's constituency. The voters (presumably) voted for a set of policies, and whoever serves during the Governor's disability should be in tune with those policies (the Mike Curb example).

Consider how the position of the person who fills the gubernatorial vacancy is itself filled during the Governor's disability.


Consider disaster and terrorism scenarios.

Exhibit 3

STATE OF TENNESSEE
Office of the Attorney General
P.O. Box 20207
Nashville, Tennessee 37202

MEMORANDUM

To: Members of the Governor's Advisory Committee

From: Andy D. Bennett 
Chief Deputy Attorney General

Re: Options for Constitutional Amendment

Date: June 5, 2007

At the Committee meeting held on April 26, 2007 I posed a series of questions that the Committee will have to answer as it decides what the amendment the Committee recommends will contain. The Committee requested that I prepare several options for each question.

1. What form does this amendment take?
 - (a) Add a new paragraph to Art. III, Sec. 12?

This is simple. You do not have to integrate what you are proposing with what is there now.
 - (b) Rewrite Art. III, Sec. 12?

You have to be careful about keeping the intent regarding permanent vacancies the same as you incorporate language about temporary vacancies into the paragraph.

2. Do you want to include a voluntary process?

- (a) Including a voluntary process for the governor to temporarily relinquish his powers provides an easy, clear way to address a short period during which the governor believes he is unable to perform the duties of the office.
- (b) Don't clutter up the Constitution with matters that are not likely to occur. Less than half the states have a voluntary process.
- (c) Include language leaving it up to the legislature to determine the need and to establish a voluntary process.

3. If you want a voluntary process, to whom shall the governor deliver the notice?

- (a) Chief Justice [Maine]
- (b) Secretary of State and President of the Senate [New Hampshire]
- (c) President of the Senate and Speaker of the House [Missouri]
- (d) Secretary of State, Speakers of both Houses and successor (if not one of the two speakers).

4. How does the governor resume power?

- (a) The governor sends a written declaration that the disability no longer exists.
- (b) Establish a procedure whereby the governor asks a third party for the return of his powers and has the burden of proving the disability no longer exists.

5. Do you want a process by which the governor's resumption of power can be challenged?

(a) Most states do not have a process to challenge the governor's resumption of power when he gave up his powers voluntarily. The resumption of authority is automatic when the governor declares that the disability is over.

(b) Massachusetts and Utah establish a process to challenge the resumption of powers whether the governor lost those powers voluntarily or involuntarily. In both states, specific officers may challenge whether the governor's disability is actually over. In Massachusetts the Supreme Court can say the governor is disabled and the legislature decides the issue. Utah lets the governor resume his authority unless the Supreme Court, upon joint request of the President of the Senate and the Speaker of the House of Representatives, or upon its own initiative, determines that the Governor is unable to discharge the powers and duties of the office.

6. Who initiates an involuntary process for declaring the governor disabled?

(a) Secretary of State [Maine, Mississippi]

(b) Attorney General and majority of the council [New Hampshire has five member council that advises the governor]

(c) Speakers of both houses [Indiana, Michigan, Utah]

(d) Both houses by joint resolution adopted by 2/3 vote [Colorado, Ohio]

(e) Attorney General [Kentucky]

(f) Secretary of State, Treasurer and Comptroller

(g) Include language allow the legislature to establish an involuntary process

7. Who are the decision-makers?

(a) Supreme Court [Colorado, Indiana, Kentucky, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, New Hampshire, Ohio, Oklahoma, South Dakota, Utah]

(b) both houses [Connecticut, Delaware, Massachusetts, Montana, North Carolina, South Carolina, Virginia]

(c) a body or group [Iowa, Wisconsin]

8. What process do you want for making the decision?

(a) Have someone (see question 6) file a petition with the decision maker (see question 7) who shall decide the issue.

Examples: Attorney General [Kentucky], Secretary of State [Mississippi] or speakers of both houses [Indiana] file with Supreme Court.

(b) Have a longer process involving all branches

Example: Majority of statewide elected officials in Louisiana determine governor is unable to discharge the powers and duties of the office. They send a written declaration to the presiding officer of each house. At this point, successor to governor takes over. Legislature convenes on third day after filing of governor's response. If 2/3 of each house votes that there is justification for determining a disability exists, successor continues. Resolution sent to Supreme Court. Supreme Court determines issue of disability after notice and a hearing.

9. What process do you want for undoing that decision once the governor is no longer disabled?

(a) Governor files a petition with the decisionmaker

(b) Just have Governor submit a statement that he is no longer disabled, perhaps with a doctor's affidavit

10. Who assumes the governor's powers and duties during the period of disability under either the voluntary or involuntary scenario?

(a) Use succession established for a vacancy, thus the Speaker of the Senate is first in line.

(i) Does the speaker get to return to his position after the governor resumes power?

(ii) Does the speaker get to turn down the assumption of the governor's powers?

(b) Have an officer from the executive branch assume the governor's powers. This ensures that someone who supports the governor's agenda will temporarily take over — consistent with the will of the people [Laramore comments]. It does not blur the lines between the executive and legislative branches.

(i) Commissioner of Finance and Administration or other cabinet level official. What happens if by statute the name of the department is changed?

(ii) Official designated by governor by executive order or in document declaring voluntary disability. This lets the governor decide who in his administration will be most likely to carry out his agenda during his temporary disability. Include Speaker of the Senate as the alternative if the Governor fails to designate an official.

Exhibit 4

Draft amendment presented to the Committee for discussion at the July 18, 2007 meeting.

The Tennessee Constitution, Article III, Section 12 is hereby amended by designating the current language as subsection (a) and by adding the following language as subsection (b):

(b) Whenever the Governor transmits to the Secretary of State, the Speaker of the Senate and the Speaker of the House a written declaration that the Governor is unable to perform the powers and duties of the office, the powers and duties of the office of Governor shall be exercised by the Speaker of the Senate or, if that office is unoccupied, by the Speaker of the House of Representatives. The powers and duties of the office shall return to the Governor when the Governor transmits to the same officials a written declaration that the Governor is able to perform the powers and duties of the office [or upon the 90th day following the issuance of the declaration by the Governor, whichever occurs first].

Whenever the Attorney General and Reporter, after consultation with the Secretary of State, Comptroller of the Treasury and Treasurer, is of the opinion that the Governor is unable to perform the powers and duties of the office, the Attorney General shall file a petition with the Tennessee Supreme Court seeking a declaration that the Governor is unable to perform the powers and duties of the office. The Supreme Court shall have original jurisdiction to hear the petition and upon a decision by the Court that the Governor is unable to perform the powers and duties of the office, those powers and duties shall be exercised by the Speaker of the Senate or, if that office is unoccupied, by the Speaker of the House of Representatives. The Governor may at any time petition the Supreme Court to determine that the inability to perform the powers and duties of the office of Governor no longer exists. Upon such a determination by the Supreme Court, the powers and duties of the office will return to the Governor.

No person shall exercise the powers and duties of the Governor while occupying another office. If both the offices of Speaker of the Senate and Speaker of the House of Representatives are unoccupied at the time the disability is determined or if both decline to assume the powers and duties of the office of Governor, then the powers and duties of the Governor shall be exercised by the Secretary of State, Comptroller of the Treasury and Treasurer, in that order. During the pendency of a disability, the Governor shall retain the salary and benefits attached to the office and the person performing the powers and duties of the office shall receive the same salary and benefits as the Governor.

Exhibit 5

SENATE JOINT RESOLUTION ____
by _____

A RESOLUTION to propose an amendment to Article III,
Section 12 of the Constitution of the
State of Tennessee, to provide for the
exercise of the powers and duties of the
governor during a temporary disability.

BE IT RESOLVED BY THE SENATE OF THE ONE HUNDRED FIFTH GENERAL
ASSEMBLY OF THE STATE OF TENNESSEE, THE HOUSE OF REPRESENTATIVES
CONCURRING, that a majority of all the members of each house concurring, as shown by the
yeas and nays entered on their journals, that it is proposed:

That the Tennessee Constitution, Article III, Section 12 be amended by designating the
current language as subsection (a) and by adding the following language as subsection
(b):

(b) Whenever the Governor transmits to the Secretary of State, the
Speaker of the Senate and the Speaker of the House a written declaration that the
Governor is unable to perform the powers and duties of the office, the powers and
duties of the office of Governor shall be exercised by the Speaker of the Senate or,
if that office is unoccupied, by the Speaker of the House of Representatives. The
powers and duties of the office shall return to the Governor when the Governor
transmits to the same officials a written declaration that the Governor is able to
perform the powers and duties of the office.

Whenever the Attorney General and Reporter, after consultation with the
Secretary of State, Comptroller of the Treasury and Treasurer, is of the opinion

that the Governor is unable to perform the powers and duties of the office, the Attorney General shall file a petition with the Tennessee Supreme Court seeking a declaration that the Governor is unable to perform the powers and duties of the office. The Supreme Court shall have original jurisdiction to hear the petition, and, upon a decision by the Court that the Governor is unable to perform the powers and duties of the office, those powers and duties shall be exercised by the Speaker of the Senate or, if that office is unoccupied, by the Speaker of the House of Representatives. The Governor may at any time petition the Supreme Court to determine that the inability to perform the powers and duties of the office of Governor no longer exists. Upon such a determination by the Supreme Court, the powers and duties of the office will return to the Governor.

No person shall exercise the powers and duties of the Governor while occupying another office. If both the offices of Speaker of the Senate and Speaker of the House of Representatives are unoccupied at the time the disability is declared or determined or if both decline to assume the powers and duties of the office of Governor, then the powers and duties of the Governor shall be exercised by the Secretary of State, Comptroller of the Treasury and Treasurer, in that order. During the pendency of a disability, the Governor shall retain the salary and benefits attached to the office and the person performing the powers and duties of the office shall receive the same salary and benefits as the Governor.

BE IT FURTHER RESOLVED, that the foregoing be referred to the One Hundred Sixth General Assembly and that this resolution proposing such amendment be published in accordance with Article XI, Section 3 of the Constitution of the State of Tennessee.

BE IT FURTHER RESOLVED, that the clerk of the Senate is directed to deliver a copy of this resolution to the Secretary of State.